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No. 82-237

In The

Supreme Court of the United States

October Term, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner,

vs.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, and UTAH INTERNATIONAL INC.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

RESPONDENT UTAH INTERNATIONAL INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the ruling below—that the state trial court did not abuse its discretion in denying a writ of mandate seeking to overrule a state agency's adjudication of private water rights—based upon an independent and adequate state ground?

2. Is the ruling below that "each adjudication [of water rights] must conform with the laws of the state where the water is diverted" consistent with the express terms to that effect in Article VII of the Yellowstone River Compact?

PARTIES TO THE PROCEEDING IN MONTANA SUPREME COURT

The caption of the case in this Court contains the names of all parties. Respondent, Utah International Inc., is a corporation and in compliance with Rule 28.1, U. S. Supreme Court Rules, lists, as follows, its parent company, subsidiaries and affiliates of each such corporation:

UTAH INTERNATIONAL INC. is a wholly owned subsidiary of GENERAL ELECTRIC COMPANY. The following lists the subsidiaries (except wholly owned subsidiaries) and affiliates of Utah International Inc.

Adobe Canyon Corporation
Cyprus Pima Mining Company
Goldsworthy Mining Limited
Lake Adair Corporation
McCamey Mining Limited
Orco Shipping Corporation
P. T. Arutmin Indonesia
Pathfinder Mines Corporation
Trapper Mining Company
Utah Development Company
Waipipi Iron Sands Limited

The following lists the subsidiaries (except wholly owned subsidiaries) and affiliates of General Electric Company.[1]

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1 General Electric Credit Corporation and General Electric Overseas Capital Corporation are wholly owned subsidiaries of General Electric Company but each has issued debt instruments which are publicly held.

General Electric-Goninan Engineering Services Ltd.

General Electric-Rickard Ltd.

F. R. Tulk & Co. Pty. Ltd.

Middle East Engineering Ltd.

Inducon do Brasil, Capacitores S. A.

Sade-Sul Americana de Engenharia S. A.

Canadian General Electric Co., Ltd.

Canadian Appliance Manufacturing Co., Ltd.

Electromat S. A. Fabrica de Materiales Electricos

Evansville Cable TV, Inc.

Condisa Limitada Ingenieros Contratistas, S. A.

Sud Americana de Electrificacion, S. A.

Storno S. A. (France)

SNEF Electro-mechanique (SEM)

Storno Electronic GmbH

Westdeutsche Quarzschmelze GmbH

SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.

Engineering Plastics, Ltd.

General Electric de Mexico, S. A.

Specialty Materials International B. V.

Philippine Electrical Manufacturing Company

Middle East Engineering Limited Saudi Arabia

Sadelmi Shaker Tamimi Construction Company

Charomel Investment (Pty.) Ltd.

EICSA (Proprietary) Ltd.

Magnet Wires (Proprietary) Ltd.

Reid & Mitchell (Pty.), Ltd.

SADE S. A.

General Electrik Turk Anonim

N. C. Joseph Limited

Sud Americana de Electrificacion, S. A.

Compagnia Generale Elettromeccanica S. p. A.

Iran Electrical and Mechanical Service Company

Middle East Engineering Limited—UAE

General Electric Philippines Meter and Instruments Co., Inc.

General Electric CAE International, Incorporated

General Electric Mortgage Corporation

Lonestar Florida Pennsuco, Inc.

In addition, General Electric Company holds directly or indirectly more than a 10% interest but not more than a 50% interest in the following:

Applied Materials, Inc.

Locke Insulators, Inc.

SADE Sociedad Anonima Constructora, Commercial, Insutrial, Financiera, Inmobiliaria de Mandatos

Technibel, S. A.

Elpro International, Limited

International General Electric Company, Limited

Societa Nazionale della Officine di Savigliano, S. p. A.

General Aircon, Ltd.

Japan Nuclear Fuel Company, Limited

Toshiba Electronic Systems Co. Ltd.

Toshiba Silicone Company Ltd.

Philippine Appliance Corporation

Philippine Glass Bulbs, Inc.

Defy Industries, Ltd.

Manufacturera de Aparatos Domesticos S. A.

Toshiba—General Electric Finance Corp.

Venezolana de Compresores y Motores S. A.

Rank-General Electric Housewares Pty. Ltd.

Rank-General Electric Major Appliances Pty. Ltd.

Philippine Electric Corporation

Smith & Stone Ltd.

Galileo Electro-Optics Corporation

Wavetek

Structural Dynamics Research Corporation

Gearhart Industries Inc.

Benerson Corporation

General Electric Asia Capital Corp.

General Electric International Operations Co., Inc.

General Electric International Sales Company

High Voltage Breakers, Inc.

Hydraulic Turbines, Inc.

Drive Systems Company, Ltd.

Watt & Ackerman, Pte., Ltd.

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STATEMENT OF THE CASE

Respondent UTAH INTERNATIONAL INC. ("Utah International") filed on November 20, 1972, an application in Wyoming to appropriate water from the Powder River, one of the rivers subject to the Yellowstone River Compact (hereinafter "Compact") (Pet. App., p. 50a). The water

was to be diverted in Wyoming for ultimate uses in Montana, including industrial, irrigation, municipal, and recreational uses (Pet. App., pp. 50a-51a).

Pursuant to Article VII, Section B of the Compact (Pet. App., p. 69a), the state engineer of Wyoming sent duplicates of Utah International's application to Montana; those duplicates were received by the Montana Department of Natural Resources and Conservation (hereinafter "state agency") on December 4, 1973 (Pet. App., p. 51a). On March 15, 1974, the Montana state agency notified Utah International that if it filed the information for the water project on Montana's own forms, Montana would recognize the initial November 20, 1973, date—the date of the Wyoming filing—for purposes of determining priority of water rights (Pet. App., p. 51a).[1] The state agency noted that such a filing would comply with section 85-2-302 of the Montana Code Annotated, which provides, in pertinent part:

> "The department shall return a defective application for correction or completion together with the reasons for returning it. An application does not lose priority of filing because of defects, if the application is corrected, completed, and refiled with the department within 30 days after its return or within a further time as the department may allow." (Pet. App., p. 87a.)

On April 4, 1974, Utah International replied that it intended to file applications for water use permits on the forms proscribed by Montana (Pet. App., p. 52a).

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1 The duplicate Wyoming forms sent to the Montana state agency contained much of the same information that was required on the Montana forms (Pet. App., p. 51a).

Subsequent to these events, on September 27, 1974, petitioner filed applications with Montana and Wyoming for plans to divert water from the Powder River in Montana, constructing a dam which would result in a reservoir extending from Montana into Wyoming (Pet. App., p. 52a).

On January 14, 1975, Utah International filed the appropriate Montana forms with the state agency (Pet. App., p. 52a). The state agency assigned that application the Wyoming priority date of November 20, 1973 (Pet. App., p. 52a). The state agency rejected subsequent demands by petitioner that the agency change that priority date to January 14, 1975, when the corrected Montana forms were filed (Pet. App., p. 52a).

Petitioner filed an action with the Montana state district court, seeking a writ of mandate to compel the state agency to assign Utah International a priority date of January 14, 1975 (Pet. App., pp. 52a-53a). The state district court dismissed the application for a writ of mandate because petitioner failed to show the state agency had a clear legal duty to do anything but confirm Utah International's November 20, 1973, priority date (Pet. App., p. 46a).[2]

An appeal was taken to the Montana Supreme Court, which affirmed the state district court's decision (Pet. App., pp. 49a-58a). The Montana Supreme Court held that

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2 In a related declaratory judgment action in the Federal District Court in Montana, the Federal District Court declined jurisdiction but construed the Compact as "mandating the application of Wyoming law in any adjudication . . ." (Pet. App., p. 19a).

the lower court did not abuse its discretion in denying the writ (Pet. App., pp. 56a-57a). The court stated that the Compact required the application of the laws of the state where the water is diverted, in this case Wyoming (Pet. App., p. 57a), and that the state agency properly assigned Utah International the November 20, 1973, priority date in conformity with Wyoming law (Pet. App., p. 57a). The Montana Supreme Court held that, even if petitioner were correct in urging the application of Montana law,

> "[*petitioner*] *could not prevail even under Montana law.* The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah [International] filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah [International] the priority date of its first filing. It had no clear legal duty to do otherwise." (Pet. App., p. 57a; emphasis added.)

On May 13, 1982, the Montana Supreme Court denied a Petition for a rehearing (Pet. App., p. 60a).

ARGUMENT

The ruling of the Montana Supreme Court is based upon an independent and adequate state law ground. In considering petitioner's argument that the Yellowstone River Compact required a state agency to adjudicate water rights under Montana law, the Montana Supreme Court held that petitioner "could not prevail even under Montana law" (Pet. App., p. 57a). The Montana Supreme Court ruled that petitioner could not prevail even if the Compact were interpreted as petitioner urged; it rejected petitioner's position as a matter of Montana state law.

To the extent the Montana Supreme Court discussed the Yellowstone River Compact, its discussion was entirely consistent with the terms of the Compact. The state court explained that "the Compact provides that each adjudication must conform with the laws of the state where the water is diverted," in this case Wyoming (Pet. App., p. 57a). This ruling is in accord with the express terms of Article VII, Section C of the Compact, which provides: "Each adjudication is to conform with the laws of the state where the water is diverted * * *" (Pet. App., p. 69a).

The court below also properly rejected petitioner's assertion that Article XVIII of the Compact required application of Montana law. Article XVIII provides only that the Compact shall not be construed "*to divest* any signatory state or any of the agencies or officers of such states *of the jurisdiction* of the water of each state as apportioned in this compact." (Pet. App., p. 72a; emphasis added). In the instant case, the Montana state agency was never divested of jurisdiction at any time; to the contrary, that agency maintained jurisdiction over the subject water at all times (Pet. App., pp. 51a-52a).

Basically this litigation involves a dispute between two private parties—Intake and Utah International—as to which corporation has the prior water appropriation date. When Intake eschewed any administrative remedy before the Department in favor of the mandamus court action involving Utah International, a great flurry of legal contentions from both Intake and Utah International were brought forth as to whether mandamus lay and whether the Department had violated a clear legal duty in refusing to change Utah International's priority date as demanded

by Intake. In the course of those legal interchanges, the significance of the various Compact provisions was raised by the parties and argued to meet their varying legal needs. But in so doing, this case wasn't elevated to anything of substantial federal (interstate) significance. Nobody other than Intake and Utah International has any real "stake" in the final outcome of the litigation. Montana, through its Department of Natural Resources, has never felt deprived of jurisdiction over the water in question by virtue of any Compact provision (Supreme Court Opinion, Pet. App., p. 56a).

I. The Ruling Below Is Based Upon An Independent And Adequate State Ground.

In rejecting petitioner's argument that the state agency should have applied Montana law and that such law required the agency to assign Utah International a later priority date for water rights, the Montana Supreme Court held that petitioner "could not prevail even under Montana law." (Pet. App., p. 57a). It is well settled that where, as in the instant case, "the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Supreme Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935). The record demonstrates that the Montana Supreme Court's holding—that petitioner could not prevail even if, as petitioner urged, the Compact required application of Montana law—constitutes an independent and adequate state ground to support the judgment.

The crux of petitioner's position, before both this Court and the Montana Supreme Court, is the assertion that the Yellowstone River Compact requires the Montana state agency to apply Montana state law in determining the priority date for respondent's filing (Pet., pp. 15-17; Pet. App., pp. 54a-56a). Petitioner totally ignores the critical holding of the court below—that it could not prevail under Montana law even if petitioner were correct in asserting that the Compact requires application of Montana law:

> "The Department is given the discretion under Montana's Water Use Act of allowing up to 18 months for a correction of defective filing. Utah [International] filed the appropriate Montana forms with the Department within that period. The Department correctly assigned Utah [International] the priority date of its first filing. It had no clear legal duty to do otherwise." (Pet. App., p. 57a.)

II. The Ruling Below Is In Accord With Articles VII and XVIII of the Yellowstone River Compact.

The express terms of Article VII of the Compact completely refute petitioner's argument that the ruling below is inconsistent with the provisions of the Compact (Pet., pp. 14-20). Article VII, Section C of the Compact provides:

> "Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to *conform with the laws of the state where the water is diverted* and shall be recorded in the county

> and state where the water is used." (Pet. App., p. 69a; emphasis added.)

The terms of Article VII should dispel any doubt as to the question posed by petitioner—whether "Montana water officials correctly assigned [Utah International's] Wyoming priority date to [Utah International's] application in Montana." (Pet., p. 15). The clear language of Article VII demonstrates that the parties to the Compact intended to allow a signatory state to apply the laws of the state where the water is diverted (Pet. App., pp. 18a-19a).

There is no basis for petitioner's contention (Pet., pp. 12-14) that the ruling below is inconsistent with the principle expressed by the Compact in Article XVIII that

> "[n]o sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact." (Pet. App., p. 72a.)

Petitioner fails to come to grips with the distinction between a state agency's jurisdiction and the agency's choice of applicable law in making its decision. As the Montana Supreme Court noted, "the Department did not divest itself of its jurisdiction of the water allocated to Montana under the Compact"—to the contrary, the Montana state agency required respondent to submit its filings on the Montana forms, thus insuring the jurisdiction of Montana over the water (Pet. App., pp. 56a, 51a, 52a). At most, petitioner quarrels with the Montana state agency's decision in assigning priority dates; it is beyond dispute that the Montana state agency retained jurisdiction in the instant case.

The ruling below is in accord with both the terms and principles of the Compact. To find that the Compact bars a state from recognizing a priority date obtained in the state in which the water is diverted would lead to the emasculation of Article VII of the Compact. The goal of the parties to the Compact was to avoid "forum shopping" for water rights, by ensuring that the same substantive law of the state of diversion would be applied regardless of which state was adjudicating the water rights. Without this choice-of-law provision, parties would be free to seek conflicting priority dates from the state of diversion and from the state to which the water is apportioned. Under petitioner's theory, "Montana is awarded absolute and controlling authority over water apportioned to it by the Compact." (Pet., p. 17). The practical result would be to strip the law of the state of diversion of all effect—the antithesis of Article VII of the Compact.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED this 12th day of October, 1982.

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